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**WHEN BLOOD IS THICKER THAN WATER:  
FOSTER PARENT ADOPTION IN NEW ZEALAND**

Submitted for the LLB (Honours) Degree at  
Victoria University of Wellington

AUGUST 2003

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## ***I INTRODUCTION***

Adoption is an area of law that has been the subject a large amount of consideration. Yet very little of this has focused on or even identified the specific issues relating to foster parent adoptions. This paper examines the law and policy in New Zealand relating to the adoption of foster children by their foster parents.

The paper identifies the wider issues of foster parent adoption in New Zealand, particularly its role within the issue of the placement of children needing alternative care. The contentious issues in the operation of the Adoption Act 1955 with respect to foster parent adoptions are then identified. This is followed by an examination of the Department of Child Youth and Family Services (CYFS) policies relating to foster parent adoption.

The United States and United Kingdom have accorded greater recognition and assistance to foster parent adoptions. The paper details some of the legal and policy approaches of these countries.

From this basis, the paper examines some of the normative issues and values underlying the law and policy in New Zealand. The paper aims to assess the best role for foster parent adoption within the context of children needing alternative care. Finally, this paper provides some suggestions for law and policy reform.

## ***II BACKGROUND***

### ***A What is foster parent adoption?***

Adoption is the process whereby the legal parents of a child<sup>1</sup> are changed. Adoption in New Zealand currently incorporates a variety of situations, including non-relative, relative, stepparent and inter-country adoptions, as well as foster parent adoption.

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<sup>1</sup> Throughout this paper, the terms "child" and "children", will also include "young person" and "young persons" as defined by the Children, Young Persons, and Their Families Act 1989, s 2.



Foster care is the practice of providing alternative family homes for children who, for a variety of reasons, cannot live with their own families. When a child is found to be in need of care or protection under the Children, Young Persons and Their Families Act 1989 (CYPF Act), the State, represented by CYFS, make a foster placement.<sup>2</sup> Placements may also be made voluntarily by parents with agencies, such as Anglican or Catholic Social Services, or through arrangements with friends and relatives.<sup>3</sup>

This paper focuses primarily on the adoption of children under CYFS care with social worker-appointed foster parents. These placements result from decisions made at family group conferences and in the Family Court.<sup>4</sup> In most cases, when a child comes into care, it is CYFS aim that they should return home.<sup>5</sup>

A foster parent adoption occurs when the people who have been caring for a child as foster parents become the child's legal parents through adoption. Foster parent adoption will only arise when the child is in need of long-term care.

This form of adoption is distinctive because the child has been in the care of the adoptive parents before the adoption, and is often already considered part of their family. The adoptive parents already have a formal, though not legal, relationship with the child, yet they are not biologically related. Usually the adoptive parents did not intend to adopt the child when care began.

Foster parent adoptions are not common in New Zealand. Only nine of the 636 children adopted in the 2001/2002 fiscal year were adopted by their foster parents. Between 1994 and 2002, only 1.6 per cent of all adoptions granted or recognised by New Zealand were foster parent adoptions.<sup>6</sup>

<sup>2</sup> Children, Young Persons and Their Families Act 1989, ss 14 and 43.

<sup>3</sup> N A Johnston and R J Hooker "The law relating to foster care in New Zealand (I)" (1985) NZLJ 160, 160.

<sup>4</sup> Child Youth and Family Website <<http://www.cyf.govt.nz>> (last accessed 9 July 2003).

<sup>5</sup> Child Youth and Family Website, above.

<sup>6</sup> Child Youth and Family Website, above.



## **B      *The Legal Framework - Adoption Act 1955***

The court makes adoption upon application of prospective adopters.<sup>8</sup> Adoption changes the surname of the child to that of the adoptive parent.<sup>9</sup> Adoption deems that this child becomes the child of the adoptive parent as if "born to that parent in lawful wedlock".<sup>10</sup>

The consent of the birth mother and any other guardians is required for an adoption to be granted.<sup>11</sup> However the court may dispense with this consent under section 8 when certain factual grounds are made out.

To make an adoption order, the court must be satisfied under section 11 that the adopters are "fit and proper" parents and that the welfare and interests of the child are promoted by the adoption.<sup>12</sup> The existing parents may also attach a condition on the religious upbringing of the child to the adoption.<sup>13</sup> A social worker must provide a report on the application to the court before an interim adoption order can be made.<sup>14</sup> This is often influential in the court's determination of the adoption application under section 11.

## **C      *Special Issues of Foster Parent Adoptions***

There are several features of foster parent adoption that set it apart from other forms of adoption. The type of relationship transformation that takes place, the purpose and the relevance of the wider issue of children needing foster care placements, are significant aspects of foster parent adoption.

Foster parent adoption is distinctive in involving the transformation of an existing parent-child relationship. Stepparent adoption involves a similar transformation of an existing relationship, but only for one parent. The child

<sup>7</sup> Relevant sections of the Adoption Act 1955 are in Appendix One.

<sup>8</sup> Adoption Act 1955, s 3(1).

<sup>9</sup> Adoption Act 1955, s 16(1).

<sup>10</sup> Adoption Act 1955, s 16(2)(a) & (b).

<sup>11</sup> Adoption Act 1955, s 7(2)(a).

<sup>12</sup> Adoption Act 1955, s 11(a) & (b).

<sup>13</sup> Adoption Act 1955, s 11(c).



always retains one of their existing parents. However, in foster parent adoption, the child does not retain a legal relationship with either of their existing parents. The foster parents were previously responsible only for the child's day-to-day care. When they adopt, the foster parents gain added responsibilities. The relationship is made permanent. Parental authority is no longer shared. Decisions can be made without CYFS and birth family involvement. The adopters have full financial and legal responsibility for the child.<sup>15</sup>

The purpose of foster parent adoption also sets it apart from other forms of adoption. The purpose of most adoptions is primarily to meet the adoptive parents desire for a child. Yet foster parent adoption is more about the child's needs. The fostering situation has been created because the child lacks a safe family environment. Foster parent adoption is a step to secure this family environment. Foster parent adoption consequently cannot be viewed "in isolation from the wider issue of the placement of children needing alternative care."<sup>16</sup>

Another distinctive characteristic of foster parent adoption is its relationship to this wider issue. Foster parent adoption is intrinsically linked to the foster care system and the placement of children who cannot stay with their birth families. These issues are complex. Concern over the perceived deficiencies within the child protection and foster care system is increasing. The statistics show the escalating nature of the issue. More than 5,000 children were in care in New Zealand in 2000. This has been increasing by up to 12 per cent each year. The average number of placements in a year for each child is 3.1, a figure that has tripled in 20 years.<sup>17</sup> The 2000 Ministerial Review of CYFS (the Brown Report) described these statistics as "alarming".<sup>18</sup>

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<sup>14</sup> Adoption Act 1955, s 10

<sup>15</sup> Nancy Ashe *From Fostering to Adopting* (About. Inc, 2003)

<<http://adoption.about.com/library/weekly/aa101899.htm>> (last accessed 26 May 2003).

<sup>16</sup> M J A Brown *Care and Protection is About Adult Behaviour: Ministerial Review of the Department of Child Youth and Family Services* Report to the Minister of Social Services and Employment (Hon Steve Maharey) December 2000, [The Brown Report], 76.

<sup>17</sup> Child Youth and Family Service (submission to Ministerial Review of the Department of Child Youth and Family Services, 2000) 38.

<sup>18</sup> Brown, *Care and Protection is About Adult Behaviour*, above, 70.



Foster parent adoption is one way that children who are in foster care can find a permanent home and family. It is a way to counter the problem known as "drift in care", where children continually move between foster homes. According to the Brown Report, "drift in care" results in an enormous disruption to the lives of children.<sup>19</sup> Research has shown that this drift from placement to placement can have serious psychological impacts on children. Goldstein, Freud and Solnit in their celebrated work *Beyond the Best Interests of the Child*, highlighted the importance of uninterrupted adult presence and attention to a child's development. Interrupting the continuity of these relationships results in a child's "emotional attachments becoming increasingly shallow and indiscriminate."<sup>20</sup> A lack of permanence in placement is likely to result in a child regressing "along the whole line of his affections, skills, achievements and social adaptations."<sup>21</sup> Drift in care has been recognised as a problem in New Zealand. The Hon. Steve Maharey, Minister of Social Services, in his address to the New Zealand Family and Foster Care Federation AGM in 2001, recognised the problem of children 'cycling' through multiple care placements.<sup>22</sup>

Foster parent adoption is a potential solution to this severe problem. Therefore further investigation into how it can be facilitated is warranted.

### **III LEGAL ISSUES OF FOSTER PARENT ADOPTION**

There are two commonly contentious areas of the Adoption Act 1955 in foster parent adoption cases. First, dispensing with the birth parents consent to the adoption may be an issue where they do not approve the foster parents adoption. Secondly, the decision under section 11(2) to decide whether the adoption promotes the child's welfare and interests may also be highly contentious given the particular factors that must be balanced.

<sup>19</sup> Brown *Care and Protection is About Adult Behaviour*, above, 70.

<sup>20</sup> Joseph Goldstein, Anna Freud and Albert Solnit *Beyond the Best Interests of the Child* (Free Press, New York, 1973) 32.

<sup>21</sup> Goldstein, Freud and Solnit *Beyond the Best Interests of the Child*, above, 18.

<sup>22</sup> Hon Steve Maharey, Minister of Social Services and Employment "Marking 25 Years of Quality Care" (Speech to New Zealand Family and Foster Care Federation, Christchurch, 20



## A Dispensing with consent

Dispensing with consent can be an important issue in foster parent adoption. There is considerable potential for the birth parents to refuse to consent to their child's adoption by the foster parents. Normally the birth mother's and sometimes father's consent to the adoption is required. However, the Court may dispense with this consent where it is satisfied under section 8 that:<sup>23</sup>

- (a) ... the parent or guardian has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child;
- (b) ... the parent or guardian is unfit, by reason of any physical or mental incapacity, to have the care and control of the child; that the unfitness is likely to continue indefinitely; and that reasonable notice ... has been given

The birthmother's consent was only dispensed with in one quarter of the 49 foster parent adoptions between 1995 and 2000.<sup>24</sup> However, many of the reported foster parent adoption decisions involve an application to dispense with the consent of the birth parents.

The Court of Appeal in *Director-General of Social Welfare v L* determined how section 8 was to be interpreted. The Court decided that first the factual circumstances required to meet the grounds for dispensing with consent are to be looked at. Only then can the court look at the welfare and interests of the child.<sup>25</sup>

The case law indicates factors that make fulfilling the grounds for dispensing with consent more likely. Where the birth parents have made very little contact with the child, a finding of neglect under section 8(1)(a) is more probable. In both *L and L v J*<sup>26</sup> and *Rayner v Morris*<sup>27</sup> little contact by the birth parents over

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April 2001) <<http://www.scoop.co.nz/mason/stories/PA0104/S00302.htm>> (last accessed 27 June 2003).

<sup>23</sup> Adoption Act 1955, s 8(1)

<sup>24</sup> Adoption Information and Services Unit, Data Summary "Foster Parent Adoptions" (March 2003).

<sup>25</sup> *Director-General of Social Welfare v L* [1989] 2 NZLR 314.

<sup>26</sup> *L and L v J* (1988) FRNZ 497.



two years was decisive in dispensing with consent. By contrast in *Director-General of Social Welfare v H*<sup>28</sup>, a mother's persistent visits and requests for the return of her twins meant that the court decided not to dispense with her consent despite the Department's desire to see them adopted.

The parent's incapacity or inability to look after the child also makes dispensing consent more likely. In the recent case of *Application by W (adoption)*<sup>29</sup>, both birth parents suffered from mental illness. They were held to be unable to fulfil the normal duty and care of parenthood. In *Adoption application by C*<sup>30</sup>, Judge Boshier dispensed with the birth mother's consent. Her limited intellect and ability meant she was unlikely to contribute as a guardian in any meaningful fashion.

According to the Court of Appeal in *Director-General of Social Welfare v L* the welfare of the child is not examinable until after the factors in section 8 have been made out.<sup>31</sup> It is therefore arguable that the welfare of the child is not the paramount consideration in dispensing with consent proceedings as it is in other family law legislation such as the Guardianship Act 1968 and the CYPF Act. Johnston and Hooker, legal advisers to the Department of Social Welfare, described the narrow grounds as leading to a lack of focus on the child's welfare. In their opinion, this was an obstacle to promoting foster parent adoption. In their experience, many birth parents that will never be able to adequately care for their child still exercise access and show interest. The grounds for dispensing consent in these cases will therefore never be made out. These children will never be adopted if their parents oppose the adoption, even despite the potential benefits for their welfare.<sup>32</sup>

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<sup>27</sup> *Rayner v Morris* [1990] NZFLR 313.

<sup>28</sup> *Social Welfare v H* (1984) 3 NZFLR 183.

<sup>29</sup> *Application by W (adoption)* [2002] NZFLR 913, per Judge Moss.

<sup>30</sup> *Adoption application by C* [1995] NZFLR 795.

<sup>31</sup> *Director-General of Social Welfare v L* [1989] 2 NZLR 314.

<sup>32</sup> N A Johnston and R J Hooker "The law relating to foster care in New Zealand (II)" (1985) NZLJ 201, 201-202.



## **B Welfare and Interests of the Child**

In any adoption decision the court has to determine who should raise the child based on section 11(b). In order to grant an adoption, the court must be satisfied:

- (b) That the welfare and interests of the child will be promoted by the adoption, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child;

There are certain factors contributing to the child's welfare and interests that are particularly important in foster parent adoption decisions.

Custody decisions under the Guardianship Act 1968 also involve determining the best arrangements for the welfare of the child. Such determinations are notoriously difficult because of the variety of factors that must be considered and balanced. Decisions easily become subjective and dependent on the particular judge.<sup>33</sup> Fisher J in *D v W*<sup>34</sup> set an extensive, but non-exhaustive list of factors to be considered in ascertaining the welfare of the child in a custody case, which also apply to foster parent adoption decisions:

- (a) strength of existing and future bonding
- (b) parenting attitudes and abilities
- (c) availability for and commitment to quality time with the child
- (d) support for the continued relationship [with the birth parents]
- (e) security and stability of the home environment
- (f) availability and suitability of role models
- (g) positive and negative effects of wider family
- (h) provision for physical care and help
- (i) material welfare
- (j) stimulation of new experiences
- (k) educational opportunity
- (l) wishes of the child

<sup>33</sup> Mark Henaghan "Legally Rearranging Families" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand*, (2 ed, Butterworths, Wellington, 2002), 273.

<sup>34</sup> *D v W* (1994-1995) 13 FRNZ 336.



There are clearly different social and political viewpoints on which of these is most important for the child. Each child's particular circumstances will also influence how much weight is given to each factor. The court must maintain a broad discretion in making a decision to allow for such variation.

Because the decision involves weighing factors, some factors will inevitably be prioritised over others. Analysis of judgements over the last 15 years does indicate situations where foster parent adoption is likely.

The security and stability of the child within a family is commonly decisive factor in favour of foster parent adoption. In *Application by W (adoption)*<sup>35</sup> the decision was made based on the child's need for permanence and belonging which the guardianship could not provide. This need outweighed the tie to birth parents and the child's Māori heritage.

A foster parent adoption is more likely where the foster parents can show they will maintain and nourish the child's relationship with his or her birth family.<sup>36</sup> Material considerations are secondary to stability and security, and the quality of the care and relationships.<sup>37</sup> Other critical factors are the child's psychological status and development, and the quality of parenting.<sup>38</sup> Psychological issues have also been held to take precedence over culture.<sup>39</sup>

Where the birth parents do want the child back rather than having him or her kept in foster care and they have the ability to care for the child, it is very unlikely the adoption will be granted. An example of this is *In the matter of B (adoption)*.<sup>40</sup> It was held that the long-term advantages to the child outweighed the immediate stress of returning to his birth mother. The court emphasised that it would be difficult for the child as an adoptee to accept the adoption knowing his mother had opposed it. The court also admitted that the decision might have been

<sup>35</sup> *Application by W (adoption)* [2002] NZFLR 913, 926.

<sup>36</sup> For example *Application by W (adoption)* [2002] NZFLR 913, 926, *Rayner v Morris* [1990] NZFLR 313, and *Adoption application by C* [1995] NZFLR 795, 807.

<sup>37</sup> *Walker v Walker* [1981] NZ Recent Law 257, per Hardie-Boyes J.

<sup>38</sup> *C v C* [1995] NZFLR 562.

<sup>39</sup> *Powell v Duncan* [1996] NZFLR 721.

<sup>40</sup> *In the matter of B (adoption)* [1999] NZFLR 161.



different if it had been a decision between two birth parents.<sup>41</sup> Therefore the fact of the biological relationship was significant.

### C Legal Alternatives to Adoption

Adoption is a serious, permanent step. This means the Courts often favour guardianship as an alternative means of securing the relationship between the foster parents and the child.

Under the Guardianship Act 1968 the court may appoint a person as guardian of a child. They will have the right to custody of the child and the right of control over the way the child is brought up.<sup>42</sup> Unlike adoption, guardianship is not permanent and does not create a status of legal parenthood. It terminates when the child reaches 20 or marries under that age.<sup>43</sup> Guardianship does not carry automatic rights of succession as adoption does.<sup>44</sup> Guardianship may be enough to provide for a child's sense of security as a member of a foster family. Depending on whether the birth parents also retain guardianship, the foster parents may be free to make decisions on the child's upbringing themselves.<sup>45</sup> The child's legal ties with their birth family and cultural heritage are maintained.

However in some circumstances, guardianship may not go far enough in providing the security and stability that the child needs. There may be harmful disputes on the child's upbringing between foster parents and birth parents. There is the possibility of continued, destabilising review and access applications.<sup>46</sup> In *L v G*<sup>47</sup>, a nine-year-old girl had lived with her foster parents for most of her life with little contact from her birth parents. Mahoney J dispensed with consent and allowed an adoption. He stated that before contact could be re-established with her birth family, the child must be assured of her position within the foster

<sup>41</sup> *In the matter of B (adoption)* [1999] NZFLR 161, 162.

<sup>42</sup> Guardianship Act 1968, ss 3 and 8.

<sup>43</sup> Guardianship Act 1968, s 21.

<sup>44</sup> New Zealand Law Commission, *Adoption and its Alternatives: A different approach and a new framework*, (NZLC R65, Wellington, 2000) 31-32.

<sup>45</sup> Ian Treadwell, Paul Julian and PRH Webb (eds) *Family Law in New Zealand* (7 ed, Butterworths, Wellington, 2002), 1252.

<sup>46</sup> *Family Law in New Zealand*, above.

<sup>47</sup> *L v G* (1980) 1 DCR 171.



family. If not, the contact could be unsettling and detrimental to her. There are undoubtedly circumstances where foster parent adoption will be a more satisfactory solution than guardianship.

A child could also continue in long-term foster care. Unlike in the United States and United Kingdom, in New Zealand birth parents cannot reclaim children who have been placed in care by the state without CYFS involvement. This means that the bond between foster parents and the child is less fragile in New Zealand. Maintaining the status quo may be an adequate arrangement in some circumstances. This is a simpler solution that allows full resumption of the child's relationship with their birth family in the future. However, there are many situations where the child requires a more permanent and secure situation. Foster parents may also desire a greater degree of responsibility for the child.

#### **D      *Summary***

Foster parent adoption occurs in New Zealand in certain circumstances. The law does not actively encourage it. Rather the law allows foster parent adoption when birth parents give consent or have their consent dispensed with, and the adoption is clearly in the child's best interests. Guardianship, the alternative option for legally securing the foster parent-child relationship, is facilitated instead.

### **IV      *GOVERNMENT POLICY AND PRACTICE***

The policy of the government department, CYFS, has a significant impact on foster parent adoption as an option for children needing alternative care. The CYPF Act empowers CYFS in the area of child placement.<sup>48</sup> The values within this act are significant for determining CYFS policy. The values underlying CYFS policy help to ascertain why foster parent adoption is not given a prominent role in New Zealand.

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<sup>48</sup> Children, Young Persons and Their Families Act 1989, particularly s 13(b), (c), (d) and (f).



## **A     *The Children, Young Persons and Their Families Act 1989***<sup>49</sup>

The CYPF Act emphasises returning children to their families as the solution to the problem of children in care.<sup>50</sup> The Act highlights the importance of maintaining links between the foster child and their birth family.<sup>51</sup> The Act is based on a philosophy of family autonomy. The Act also gives prominence to Māori values. In accordance with Māori tradition, the child is not given centrality.<sup>52</sup>

The Act's family focus means that there is the potential for the child's welfare to be sacrificed. Foster parent adoption requires the legal separation of the child from their birth family. This is likely to be at variance with the principles of the Act.

## **B     *Child Youth and Family Services***

CYFS have a role in reporting to the court on each adoption application. They liaise with and advise foster parents considering adoption. Through this, CYFS influences whether foster parents apply for adoption and whether they are successful when they do apply.

CYFS policy straddles a number of values. They aim to advance the wellbeing of children and families, and involve families in decisions affecting them and their children.<sup>53</sup> They are committed to achieving the government's objectives. These include obtaining permanence and stability for children. They are also

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<sup>49</sup> See Appendix 2.

<sup>50</sup> Ministry of Social Policy *Social Services Sector Statistical Report for Year Ending 2000* (Wellington, 2001) 121.

<sup>51</sup> M J A Brown *Care and Protection is About Adult Behaviour: Ministerial Review of the Department of Child Youth and Family Services* Report to the Minister of Social Services and Employment (Hon Steve Maharey) December 2000, [The Brown Report], 70.

<sup>52</sup> Department of Social Welfare *Puao-Te-Ata-Tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (Wellington, Government Printer, 1986) Annex 2, 52.

<sup>53</sup> Department of Child, Youth and Family Services *Statement of Intent: Including the Department Forecast Report for 2003/2004* E.70 S01 (2003), 4, 7.



committed to services that are fully responsive to Māori.<sup>54</sup> CYFS state that they take a “family preservation approach”, based on CYPF Act.<sup>55</sup> These values, for the most part emphasising family, have repercussions for how foster parent adoption is viewed by CYFS. At times in the past, they encouraged the adoption of children needing long-term care.<sup>56</sup> But other solutions that do not make a permanent break with the child’s birth family are now preferred.

There have been some concerns with the CYFS approach. A Family Court lawyer, in a submission to the 2000 Ministerial Review, highlighted the selectivity of social workers’ application of CYPF Act principles. The lawyer argued that too great a bias is placed on families. In this lawyer’s view, there is an unwillingness to recognise the paramountcy of the child’s welfare where there is a conflict among the Act’s principles.<sup>57</sup>

CYFS admitted in its submission to the Ministerial Review to a “fuzziness” in departmental social work practice on the importance of long-term planning.<sup>58</sup> The Ministerial Review recommends that when a child is assessed as unlikely to return home, extensive plans should be made for their permanent placement.<sup>59</sup>

## V OVERSEAS APPROACHES

The experience of the United States and the United Kingdom may provide guidance on how New Zealand should best approach foster parent adoption.

### A United States

<sup>54</sup> Department of Child, Youth and Family Services *Statement of Intent*, 7.

<sup>55</sup> Department of Child, Youth and Family Services *Submission to the Government Reviews of Referrals and Notifications and Placement Services* (Child Youth and Family Service Submission to Ministerial Review of the Department of Child Youth and Family Services, 2000) 6.

<sup>56</sup> Ian Treadwell, Paul Julian and PRH Webb (eds) *Family Law in New Zealand* (7 ed, Butterworths, Wellington, 2002), 1251.

<sup>57</sup> M J A Brown *Care and Protection is About Adult Behaviour: Ministerial Review of the Department of Child Youth and Family Services Report to the Minister of Social Services and Employment* (Hon Steve Maharey) December 2000, [The Brown Report], 71.

<sup>58</sup> Brown *Care and Protection is About Adult Behaviour*, above, 72.

<sup>59</sup> Brown *Care and Protection is About Adult Behaviour*, above, 74.



Since the 1970s, most United States adoption agencies have promoted foster parent adoption. Literature and research on the attachment of children in alternative care was widely disseminated during this period. As more understanding was gained about the negative effects of multiple placements on children, foster parent adoption was viewed as beneficial.<sup>60</sup>

Foster care is a significant issue in the United States.<sup>61</sup> Foster parent adoption, as a solution to child placement, is relatively common. In 1992, an estimated 15 per cent of the 127,000 adoptions were foster parent adoptions.<sup>62</sup>

The United States' foster care system was criticised in the 1990s because of the state's failure to provide stable, permanent homes for children.<sup>63</sup> This resulted in President Clinton's *Adoption 2002* initiative on adoption and foster care in 1996. This aimed to improve the permanency of child placements and to double the number of children adopted or permanently placed annually by 2002.<sup>64</sup> The Adoption and Safe Families Act was enacted in response to this initiative.

### 1. *Adoption and Safe Families Act of 1997 (ASFA)*

ASFA promotes the adoption of children who cannot return safely to their home through two central mechanisms.

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<sup>60</sup> Debra G Smith *Foster Parent Adoption: What Professionals Should Know* (National Adoption Information Clearinghouse, 1991) <[www.adoptions.com/aedfosterparent.html](http://www.adoptions.com/aedfosterparent.html)> (last accessed 24 May 2003).

<sup>61</sup> 520,000 children were in foster care as of January 2000 (Statistics on Adoption and Foster Care, <[www.adoptionstatistics.com/adoption\\_from\\_foster\\_care\\_1999.php](http://www.adoptionstatistics.com/adoption_from_foster_care_1999.php)> (last accessed 27 June 2003). Nearly 50 per cent of children in foster care will remain in care for more than three years. (National Centre for Resource Family Support "General Adoption Statistics" <[www.casey.org/chc/quick/facts/adoption/statistics.htm](http://www.casey.org/chc/quick/facts/adoption/statistics.htm)> (last accessed 27 June 2003).

<sup>62</sup> The Evan B. Donaldson Adoption Institute "Overview of Adoption in the United States, 2002" <<http://www.adoptioninstitute.org/FactOverview.html#head>> (last accessed 8 July 2003). 1992 was the last year United States adoption totals were gathered.

<sup>63</sup> Susie Ebert *The Adoption and Safe Families Act (ASFA)* (Lutheran Children and Family Service, Pennsylvania, 2002) <[http://www.lcfsinpa.org/articles/article\\_asfa.htm](http://www.lcfsinpa.org/articles/article_asfa.htm)> (last accessed 6 July 2003).

<sup>64</sup> Donald N Duquette, Mark Hardin and Carolyn Payne Dean, US Department of Health and Human Services *Adoption 2002: The President's Initiative on Adoption and Foster Care – Guidelines for Public Policy and State Legislation Governing Permanence for Children* (1999) <<http://www.acf.dhhs.gov/programs/cb/publications/adopt02>> (last accessed 27 June 2003).



Firstly, there is a requirement on States to initiate termination of parental rights proceedings in most cases where children have been in care for 15 of the last 22 months.<sup>65</sup> This provision means that children in long-term care will commonly be freed for adoption. Adoption of these children, including adoption by their foster parents, is more straightforward. The consent element has already been satisfied.

Secondly, states are given incentive payments by Federal Government if they increase the number of children adopted from foster care.<sup>66</sup> This encourages State governments to actively seek adoptive placements for children in care. Foster parents are encouraged to consider adoption by their agency.

The ASFA has been the subject of criticism. Some critics have argued that the Act does not put children first and failed to bring about structural reform to the child welfare system.<sup>67</sup> ASFA provides two possible outcomes for children: permanent placement with the child's own family or the termination of parental rights. Some critics have considered the lack of options between these two extremes to be a problem.<sup>68</sup>

However, ASFA has produced dramatic results in the United States. Foster parent adoptions increased by 78 per cent between 1996 and 2000.<sup>69</sup> It is estimated that ASFA has resulted in 34,000 additional adoptions from 1998 to 2000 that would not have otherwise occurred.<sup>70</sup>

## 2. *Subsidies*

<sup>65</sup> Adoption and Safe Families Act, PL 105-89, s 103, (1997).

<sup>66</sup> Adoption and Safe Families Act, PL 105-89, s 201, (1997).

<sup>67</sup> Robert M. Gordon "Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997" *Minn L Rev*, 83, 1999, 3, 637-701, 639

<sup>68</sup> Libby S. Adler, "The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997" *H J Leg*, 38, 1, 2001, 1-36, 10.

<sup>69</sup> U.S. Department of Health and Human Services, Administration for Children & Families, "HHS Awards Adoption Bonuses" (HHS News, Sept. 10, 2001),

<<http://www.acf.dhhs.gov/news/press/2001/adoption.html>> (last accessed 27 June 2003).

<sup>70</sup> Penelope L Maza "The Age Factor in Adoption," (2001) 16 *The Roundtable Journal of the National Resource Centre for Special Needs Adoption* 1, 3.



Another important legal mechanism is the provision of adoption subsidies to families. If a family is having difficulty committing to adoption because of financial concerns, that barrier is removed.<sup>71</sup> Eighty-six percent of families adopting children from foster care receive subsidies to help with the long-term care of the child.<sup>72</sup>

## **B United Kingdom**

Foster parent adoptions make up approximately eight per cent of all adoptions in the United Kingdom.<sup>73</sup> The adoption of children needing alternative care has become part of child-care strategy in the United Kingdom.<sup>74</sup> The following are some of the features of the United Kingdom's adoption law.

### *1. Adoption and Children Act 2002 (UK)*

The new Adoption and Children Act 2002 departs from previous legislation by encouraging adoption. This Act aims to speed up the adoption process and increase the number of children adopted from care by at least 40 per cent.<sup>75</sup> The Act makes child welfare throughout life the paramount consideration. It establishes that delay in finding a placement is prejudicial to a child's welfare.<sup>76</sup> This echoes the United Kingdom's former "freeing for adoption" procedure. "Freeing for adoption" had the potential to make adoption of children in care, including foster parent adoption, much easier. However in practice, in many cases, freeing was used as a means of dispensing with parental consent. Because

<sup>71</sup> Debra G. Smith *Foster Parent Adoption: What Professionals Should Know* (National Adoption Information Clearinghouse, 1991) <[www.adoptions.com/aedfosterparent.html](http://www.adoptions.com/aedfosterparent.html)> (last accessed 24 May 2003).

<sup>72</sup> Statistics on Adoption and Foster Care, <[www.adoptionstatistics.com/adoption\\_from\\_foster\\_care\\_1999.php](http://www.adoptionstatistics.com/adoption_from_foster_care_1999.php)> (last accessed 27 June 2003).

<sup>73</sup> UK Department of Health *Adoption Statistics*, <http://www.doh.gov.uk/adoption/statistics.htm> (last accessed 9 July 2003). In the year ending March 2002, 3,400 children were adopted from care and 550 of these were adopted by their foster parents.

<sup>74</sup> Caroline Bridge "Adoption: The Future – Analysis of the British White Paper" (1994) 1 BFLJ (NZ), 7.

<sup>75</sup> Source Correspondent "Adoption and Children Act" (18 November 2002) *The Source Public Management Journal* <<http://www.sourceuk.net/indexf.html>> (last accessed 27 June 2003).

<sup>76</sup> Adoption and Children Act 2002 (UK), s 1(1) and (2).



of the large number of contested hearings, freeing actually slowed down the adoption process.<sup>77</sup>

Provisions of the Adoption and Children Act 2002 allow parents to give advanced consent to an adoption order at the time their child is placed in care.<sup>78</sup> The Act also restricts the ability of parents to remove their children from foster care when they have been there for a certain number of years.<sup>79</sup>

## *2. Dispensing with consent*

The grounds for dispensing with parental consent in the United Kingdom include the birth parents unreasonably withholding their consent.<sup>80</sup> The United Kingdom courts use this ground to consider the interests of the child during the dispensing with consent stage.<sup>81</sup>

## *3. Adoption allowance*

The United Kingdom also has in place legislation that provides for financial assistance to adopters.<sup>82</sup> This is especially relevant when the child suffers from a mental or physical disability, or emotional or behavioural difficulty.

# **VI FACTORS SHAPING FOSTER PARENT ADOPTION LAW**

This section calls attention to some of the competing values that shape the position of judges and the government on foster parent adoption. The interests of the parties involved in a foster parent adoption are also identified. It is difficult to determine which values and interests should predominate. However, an

<sup>77</sup> Chris Barton and Gillian Douglas *Law and Parenthood* (Butterworths, London, 1995) 349.

<sup>78</sup> Adoption and Children Act 2002 (UK), ss 19 and 20.

<sup>79</sup> Adoption and Children Act 2002 (UK), s38.

<sup>80</sup> Adoption Act 1976 (UK), s 16(2)(b).

<sup>81</sup> N A Johnston and R J Hooker, "The law relating to foster care in New Zealand (II)", (1985) NZLJ, 201, 201.

<sup>82</sup> The Adoption Allowance Regulations 1991 (UK).



examination of New Zealand's social and cultural background does provide an explanation for New Zealand's stance.

#### **A Values Important in Foster Parent Adoption Cases**

The often-competing values of the *blood* or biological tie and the *psychological* tie are central to foster parent adoption decisions. It can be difficult to balance the claims of biological parents and foster parents to determine where the child's best interests lie. Inevitably, what is most important for the child will be decided on the basis of value judgements. The permanence of adoption as a procedure is influential here. The psychological tie in adoption is less likely to be favoured than in less permanent decisions like custody.

?! explain meaning

Another important value is that of *permanence*. Children need permanence for healthy development. Permanence is the only adequate way to counter the problems of "drift in care" discussed earlier. Law and policy should be targeted towards achieving permanence for children in care. Foster parent adoption is one way permanence may be achieved. Law and policy that prioritises the value of permanence may therefore promote foster parent adoption to a greater extent than what currently occurs. In United States policy, permanence is the central value. There is arguably less emphasis on the biological relationship and a greater willingness to sever the legal tie than in New Zealand.

In addressing these values, one must maintain a balanced perspective. Permanence is an important value, and one that has been neglected at times. However, any solution must also take into account biological and cultural ties, the child's psychological well being, and numerous other factors.

#### **B The Three Interests in the Foster Parent Adoption Triangle**

Any reforms need to take into account the interests of the child, the birth parents and the foster parents.



Children need a process that is careful to balance all the factors contributing to their welfare. A long-term view of placement is also needed. The child's wishes need to be taken into account where the child is old enough. Messy legal battles between foster parents and birth parents should be avoided. The child should also be able to maintain an ongoing relationship with their birth parents, where this is in their best interests.

Birth parents require security in the fostering system. They must be comfortable seeking help without fearing the loss of their child. The primary aim of foster care should be to restore the child to the birth parents. Birth parents should not be denied the opportunity to raise their child when they are willing and able to do so. Neither should birth parents be pressured into giving up their child for adoption too quickly. Birth parents should be able to play a continued role in their child's life, even if others look after their child permanently.

Foster parents require some security and authority in their relationship with their long-term foster children. They need to be clearly informed of the options available to them. Some legal recognition of their relationship should be available.

### **C     *New Zealand's Social and Cultural Context***

New Zealand's law and policy on foster parent adoption differs considerably from that of the United States and United Kingdom. Recent law in both countries actively promotes foster parent adoption as a child placement solution. In New Zealand it may be decided that adoption is not appropriate even if it is in the child's interests to remain with the foster parents. This is because it completely breaks the legal tie. A measure like that in ASFA requiring proceedings for termination of parental rights after 15 months does not seem appropriate in the New Zealand context. The biological tie is valued too highly for such a provision to be accepted.

One explanation for this difference lies in the Māori cultural influence in New Zealand. Heritage is valued much more highly in New Zealand in comparison



with the United States and the United Kingdom when it comes to family law. Over the past thirty years, New Zealand law and society has become more sensitive to the needs of indigenous and minority cultures. Correlating with this has been a "cultural renaissance of Māori values", which has impacted on family law.<sup>83</sup> Inglis J commented that "one has to live in New Zealand in order to appreciate [cultural wellbeing's] intense significance" in determining the interests of the child.<sup>84</sup> Adoption in its current statutory form poses a number of problems for Māori and other cultural groups. Māori do not approve of the complete severance of relations between the child and their birth parents. Descent is vital in establishing individual and collective identity.<sup>85</sup>

New Zealand's social and cultural context has meant more value is placed on the biological tie than in other countries. This approach is debatable. However, for the purposes of this paper, New Zealand's position will be accepted as the starting point for determining the best way foster parent adoption law and policy can be adapted.

## VII SUGGESTIONS FOR REFORM

The law and practice regarding foster parent adoption has been inadequate in a number of areas. The welfare and interests of the child are not the paramount consideration in dispensing with parental consent. Adoption is less acceptable as an option because it is an absolute and permanent legal severance. Yet other legal options for the care of a child do not provide enough permanence. Also, the loss of the care allowance and social work support is a disincentive for foster parents who may be considering adopting their foster child.

<sup>83</sup> Mark Henaghan "Legally Rearranging Families" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand*, (2 ed, Butterworths, Wellington, 2002), 283.

<sup>84</sup> *Rikihana v Parson* (1986) 4 NZFLR 289, 290-291, per Inglis J.

<sup>85</sup> Donna Hall and Joan Metge "Kua Tutu Te Puehu, Kia Mau" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (2 ed, Butterworths, Wellington, 2002), 62.

<sup>83</sup> Treadwell, Ian, Paul Julian and PRH Webb (eds) *Family Law in New Zealand* (7 ed, Butterworths, Wellington, 2002), 1252.



A change to the law can be the answer. United States experience with ASFA shows that a change in the law can have a considerable impact on foster parent adoption. Given the identified advantage of adoption for foster children in some circumstances, the law should remove the barriers to adoption where it is appropriate. Any changes should not disturb the strengths in the law, however.

Foster parent adoption is by no means the only solution to the problems of children in long-term care. Yet there are situations where it is the best option for the welfare and interests of a child. Where the foster parents and the child have an established, loving parent-child relationship and it is clear that the birth parents will never be able to resume caring for the child, adoption is likely to best secure the child's permanence and stability. The United States and United Kingdom have enacted legislation that encourages and enables foster parent adoption. Foster parent adoption is a valuable solution to issues of long-term alternative placement for some children.

The following suggestions relate to the law on adoption and financial assistance, judicial interpretation and CYFS policy. It is submitted that these recommendations will allow foster parent adoption to become a more accessible and appropriate option for the placement of children needing alternative care. These measures are in accordance with the social and cultural context, the need to find a correct values balance and the need to protect the interests of the three parties to the adoption triangle. They build upon the existing strengths in the law and attempt to find solutions where the law is weak.

#### **A Adoption Law**

Recently the Law Commission carried out a review of adoption in New Zealand.<sup>86</sup> They investigated whether adoption as an institution should be retained. A slim majority of submitters supported retaining adoption. Many were

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<sup>86</sup> New Zealand Law Commission *Adoption and its Alternatives: A different approach and a new framework* (NZLC R65, Wellington, 2000).



concerned that a substitute would not provide sufficient permanence for the child.<sup>87</sup>

Adoption as a legal concept has several advantages. It is universally recognised and comprehended in society. Adoption confers a permanent status, and with this, security and commitment.<sup>88</sup> Many objections to foster parent adoption stem from the nature of an adoption order. Modifications to adoption law can amend the areas of concern.

The Law Commission provided a number of recommendations in its report. They did not specifically examine foster parent adoption. However, implementing some of their recommendations would make foster parent adoption a more commonly appropriate option. Some of their recommendations, as well as additional suggestions, are discussed below.

### 1. Legal effect of adoption

From the 1950s, a "culture of secrecy" has surrounded adoption in New Zealand.<sup>89</sup> The Adoption Act 1955 has created a form of closed adoption. In commenting on closed adoption in New Zealand in *Re Adoption of PAT*, Blanchard J identified the purpose of this form of adoption. Adoptions were given a closed nature "to protect the child and adoptive parents from what were regarded as the stigmas of illegitimacy and infertility."<sup>90</sup>

However with social changes in the last 20 years, there has been a dramatic change in the way adoption is characterised. There has been a movement towards open adoption. This recognises the continuing contact between the child and their birth parents, and is honest about the child's history.

<sup>87</sup> NZLC, *Adoption and its Alternatives*, above, 41.

<sup>88</sup> UK Department of Health *Interdepartmental Review of Adoption Law, Discussion Paper Number 1: The Nature and Effect of Adoption* (Heywood, 1990) 58.

<sup>89</sup> NZLC, *Adoption and its Alternatives*, above, 18.

<sup>90</sup> *Re Adoption of PAT* [1995] NZFLR 817, 819.



While open adoption is widely practiced, it is not recognised in the law.<sup>91</sup> The current adoption legislation employs a legal fiction, which disguises the child's real history. The law deems that the adopted child was born to the adoptive parents.<sup>92</sup> According to the Law Commission's Report many people affected by adoption find this provision "a repugnant and an unnecessary distortion of reality."<sup>93</sup> A new definition of the legal effect of adoption that removes this legal fiction and makes adoption more open in character would eliminate some of the dissatisfaction associated with adoption.

The Law Commission proposes that the legal effect of adoption should be the transfer of permanent parental responsibility from birth parents to the adoptive parents.<sup>94</sup> The legal tie would then not be completely severed by adoption. This may encourage parental consent to the adoption. The courts may also be less hesitant to grant adoptions.

A law change, such as this one, which goes further towards recognising open adoption, would be particularly relevant for foster parent adoption. The child has usually already spent a significant part of their life with their birth parents. This fact should not be ignored.

## *2. Conditions to an adoption order*

Another change is to allow conditions or additional orders to be attached to the adoption order. This goes further towards altering the nature of adoption. Currently the only condition that can be made by the birth parents relates to the child's religious affiliation.<sup>95</sup> An order for access for the birth parents cannot be granted with an adoption. Allowing the birth parents to include conditions with the adoption order would mean adoption no longer has to be a complete severance of the relationship between the child and the birth parents.

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<sup>91</sup> NZLC *Adoption and its Alternatives*, above, 19.

<sup>92</sup> Adoption Act, s 16.

<sup>93</sup> NZLC *Adoption and its Alternatives*, above, 43.

<sup>94</sup> NZLC *Adoption and its Alternatives*, above, 45.

<sup>95</sup> Adoption Act, s 11(c).



The United Kingdom's Children's Act 1989 allows a contact order to be added to an adoption order. The court can prescribe the type and extent of contact, ranging from staying access to exchange of correspondence.<sup>96</sup> The Law Commission's proposals recommend that a parenting plan be devised at the time of an adoption. This would include conditions on the degree of contact with the birth parents and the right for the child to inherit from their birth parents.<sup>97</sup>

Other conditions are also possible. For instance, conditions to do with culture or language may be in the child's interests. Some Māori commentators have been concerned that the Adoption Act 1955 does not allow parents to make stipulations based on Māori values and priorities. These could include ensuring knowledge of language, tikanga, tribal affiliation and whakapapa.<sup>98</sup> Allowing conditions can fulfil cultural needs and make adoption more favourable.

These changes would encourage foster parent adoption, as they would increase the circumstances where adoption is appropriate. Because adoption would not have to mean the severance of the relationship between a child and their birth parents, birth parents may be more willing to consent. Judges may decide more often that the welfare and interests of the child are best served by adoption. There is a large amount of flexibility to tailor the conditions to the circumstances of each child. This means that the welfare of the child and the security of the foster parents can be upheld.

### 3. *Spectrum of care arrangements*

Another modification is to introduce several options for permanent placement of children. These would have varying degrees of permanence and parental responsibility. One suggestion is that there should be two different types of adoption order. One would be "full" adoption, which would leave adoption as it is now. This would be intended for the more traditional adoption situations such

<sup>96</sup> UK Department of Health *Interdepartmental Review of Adoption Law, Discussion Paper Number 1: The Nature and Effect of Adoption* (Heywood, 1990) 62.

<sup>97</sup> NZLC *Adoption and its Alternatives*, above, 49-50.

<sup>98</sup> Donna Hall and Joan Metge "Kua Tutu Te Puehu, Kia Mau" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (2 ed, Butterworths, Wellington, 2002), 62.



as a couple without children adopting an infant. "Simple" adoption, on the other hand, would not be a complete break between the birth family and the child. It would transfer parental authority to the adoptive parents without breaking all of the links with the birth family. The adopted child could retain their birth surname and succession rights.<sup>99</sup> Because simple adoption provides a less severe break with the child's birth family, it is likely to be appropriate in foster parent adoption situations.

The Law Commission has proposed introducing "enduring guardianship". This would encompass guardianship, but cement the guardian-child relationship for life. It is envisaged as "legally adding another relationship to a child's life rather than substituting parents."<sup>100</sup> While the Law Commission sees this mechanism as primarily for stepparents and relatives, it could be useful in some foster parent situations. In situations where there is a high degree of ongoing involvement between the child and their legal parents, siblings or extended family, adoption in any form may not be appropriate. Enduring guardianship may provide the permanence needed in these situations.

#### 4. *Dispensing with consent*

The paramount consideration in adoption and other family law decisions are the welfare and interests of the child. In proceedings for dispensing with parental consent, the court should be able look at these considerations. This should be the case even where there is not exceptional neglect or parental inadequacy. Involvement of the birth parents in the child's life should not prevent the court from dispensing with their consent if adoption is in the best interests of the child. Factors like the length of time the child has spent with foster parents, the length of time spent away from their birth parents, the degree of bonding and the child's wishes should come into these decisions also. In practice, many judges do determine dispensing with consent proceedings by looking at the child's welfare. Therefore a legislative adjustment would be codifying existing practice to an

<sup>99</sup> UK Department of Health *Interdepartmental Review of Adoption Law*, above, 62.

<sup>100</sup> NZLC *Adoption and its Alternatives*, above, 51-52.



extent. However, it may increase the number of applications as foster parents have a greater chance of succeeding according to the law.

### 5. *Judicial interpretation*

The discretionary approach to determining the welfare and interests of the child in adoption should be retained. In balancing the advantages and disadvantages to the child in each option, the courts have generally been finding in children's best interests. Ensuring certain factors are given emphasis within legislation may prevent arbitrariness in these decisions. Permanence needs to be valued highly. In upholding the child's welfare and interest with regard to permanence, the courts should view long periods of time without permanence and security as harmful.

### **B** *Financial Assistance*

One option for law reform is to introduce financial assistance to remove financial difficulty as a barrier to foster parent adoption. In the United Kingdom and various states of the United States, an adoption allowance is given in certain circumstances. Usually the assistance applies to those who could not otherwise adopt. This change would particularly affect foster parents who want to make the transition to adoptive parents because at present they lose their care allowance and get no other support when they adopt.

The United Kingdom's Adoption Allowance Regulations 1991 provide a useful example of adoption assistance. The allowance applies in a number of circumstances. An allowance is available where the child has established a "strong and important relationship" with the adopters beforehand. This often occurs with foster parents. The allowance also applies where the child has a disability, behavioural difficulty or requires expensive special care.<sup>101</sup> The adoption agency determines how much is given by taking into account the

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<sup>101</sup> The Adoption Allowance Regulations 1991 (UK), s 2(2)(a) and (c)-(e).



financial resources available to the adopters, and the financial needs of the household and child.<sup>102</sup>

Incorporating such an allowance into New Zealand law would encourage adoption by foster parents in situations where it would otherwise be too difficult.

### **C CYFS Policy**

Permanence is an important value that has not been given enough emphasis in CYFS policy. Social workers need to be aware from the start that in certain cases children may need permanent placements.

There are also steps CYFS can take to encourage foster parent adoptions where it is appropriate. Meezan and Shireman's 1985 research identified several factors within the government department's control that contribute to a decision by foster parents to adopt. Adoption was more likely where the foster parents and child discuss adoption with a social worker they know well. Access by the foster parents to information about the child's background also promoted adoption, as did contact between the birth parents and foster parents.<sup>103</sup> Social workers can provide information on all the available financial and other support. They can establish an ongoing relationship and clear communication with foster families. They can put effort into matching a foster child with the right foster parents at the time of initial placement.<sup>104</sup>

In the United States, some social service agencies allow families to choose whether to become foster, adoptive or "permanency planning foster" parents. They are then trained accordingly. The child's situation determines what sort of family they are placed with. If a child is unlikely to return home they can be placed with permanency planning foster parents. These foster parents get first preference as an adoptive placement. Agencies may identify the children more

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<sup>102</sup> The Adoption Allowance Regulations 1991 (UK), s 3(2).

<sup>103</sup> William Meezan and Joan F. Shireman *Care and Commitment: Foster Parent Adoption Decisions*, (State of New York Press, Albany, 1985), 212-213.



likely to proceed from foster care to adoption through a number of factors. These include when a child's sibling has died as a result of abuse or neglect, when the child is returning to foster care after the reoccurrence of abuse or neglect, and where birth parents are willing to have the child adopted.<sup>105</sup> CYFS could create categories of foster parents. They could institute assessment procedures that facilitate foster parent adoption in the situations where it would be most beneficial for the child.

#### **D      *Special Processes for Children in Foster Care Five Years or More***

Another suggestion is to create a special process that applies once a child has been in foster care with the same foster parents for five years or more. In these situations it is unlikely the child will return to their birth parents. They are well established with the foster parents and likely to have a psychological parent-child relationship with them. Foster parent adoption is more likely to be an appropriate option. In the correct circumstances it may be beneficial for the law and CYFS to encourage an adoption.

There are a number of forms this special process could take. A presumption that foster parent adoption is in the child's welfare and interests if they have been with their foster parents for five years could be introduced. The courts would then need to be shown evidence of factors that outweigh this presumption. Another suggestion is to have an automatic dispensation of the birth parents' consent after five years. This would only apply when there are no overwhelming reasons for requiring consent. This would be similar to the United States and United Kingdom's termination of parental rights and freeing for adoption processes.

Objections can be made to these suggestions on the basis that they erode the rights of birth parents and that they fail to take into account all factors important in determining the welfare of the child. In the New Zealand context, the

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<sup>104</sup> Debra G. Smith *Foster Parent Adoption: What Professionals Should Know* (National Adoption Information Clearinghouse, 1991) <[www.adoptions.com/aedfosterparent.html](http://www.adoptions.com/aedfosterparent.html)> (last accessed 24 May 2003).

<sup>105</sup> Smith *Foster Parent Adoption*, above.



biological tie is not to be discarded lightly. A more favourable approach may be to leave the encouraging role to CYFS. CYFS could establish a procedure where adoption is suggested to foster parents after five years if it is likely to be successful.

## **VIII CONCLUSION**

Foster parent adoption in New Zealand has not played the significant role in child placement that it can and does in other countries. Like these countries, New Zealand has escalating problems with the placement of children needing alternative care. Foster parent adoption is one potential solution that may create a permanent and secure placement for some children.

The law in New Zealand does create barriers to foster parent adoption. The requirements for dispensing with birth parent's consent are dependant on the birth parent's actions rather than the child's welfare. CYFS policy has also impeded foster parent adoption through its over emphasis on the blood tie and under emphasis on permanence.

In contrast, law and policy in the United States and United Kingdom actively promote foster parent adoption. However, the different social conditions and chosen balance of values in New Zealand must be taken into account. New Zealand society places a higher value on the biological relationship.

New Zealand's approach is shaped by this social and cultural context, the requirements of balancing values such as permanence and psychological and biological parenthood, and the need to support the interests of all three parties to the adoption triangle. Yet within these constraints, New Zealand law and policy can do more to encourage foster parent adoption. Changing the nature of adoption to make it a less severe measure, reprioritising judicial and CYFS policy, and instigating measures which actively assist and encourage foster parent adoption, can all contribute to a better approach to the law in this area.



## **IX APPENDICES**

### **A Appendix One - Adoption Act 1955**

**3. Power to make adoption orders---**(1) Subject to the provisions of this Act, a Court may, upon an application made by any person whether domiciled in New Zealand or not, make an adoption order in respect of any child, whether domiciled in New Zealand or not.

(2) An adoption order may be made on the application of 2 spouses jointly in respect of a child.

(3) An adoption order may be made in respect of the adoption of a child by the mother or father of the child, either alone or jointly with his or her spouse.

**4. Restrictions on making adoption orders---**(1) Except in special circumstances, an adoption order shall not be made in respect of a child unless the applicant or, in the case of a joint application, one of the applicants---

- (a) Has attained the age of 25 years and is at least [20] years older than the child; or
- (b) Has attained the age of [20] years and is a relative of the child; or
- (c) Is the mother or father of the child.

...

**7. Consents to adoptions---**(1) Before the Court makes any interim order, or makes any adoption order without first making an interim order, consents to the adoption by all persons (if any) whose consents are required in accordance with this section shall be filed in the Court.

(2) The persons whose consents to any such order in respect of any child are required as aforesaid, unless they are dispensed with by the Court under section 8 of this Act, shall be---

- (a) The parents and guardians of the child as provided in subsections (3) to (5) of this section; and
- (b) The spouse of the applicant in any case where the application is made by either a husband or a wife alone.

...

**8. Cases where consent may be dispensed with---**(1) The Court may dispense with the consent of any parent or guardian to the adoption of a child in any of the following circumstances:

- (a) If the Court is satisfied that the parent or guardian has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child, and that reasonable notice of the application for an adoption order has been given to the parent or guardian where the parent or guardian can be found;
- (b) If the Court is satisfied that the parent or guardian is unfit, by reason of any physical or mental incapacity, to have the care and control of the child; that the unfitness is likely to continue indefinitely; and that reasonable notice of the application for an adoption order has been given to the parent or guardian;
- (c) If a licence has been granted in respect of the child under section 40 of the Adoption Act 1950 of the Parliament of the United Kingdom, or under the corresponding provisions of any former or subsequent Act of that Parliament, or under the corresponding provisions of any Act of the Parliament of any Commonwealth country.

...

**11. Restrictions on making of orders in respect of adoption---**Before making any interim order or adoption order in respect of any child, the Court shall be satisfied---

- (a) That every person who is applying for the order is a fit and proper person to have the custody of the child and of sufficient ability to bring up, maintain, and educate the child; and
- (b) That the welfare and interests of the child will be promoted by the adoption, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child; and



- (c) That any condition imposed by any parent or guardian of the child with respect to the religious denomination and practice of the applicants or any applicant or as to the religious denomination in which the applicants or applicant intend to bring up the child is being complied with.

**16. Effect of adoption order---**(1) Every adoption order shall confer the surname of the adoptive parent on the adopted child, with such first or Christian names as the Court, on the application of the person who is applying for the adoption order, may fix.

(2) Upon an adoption order being made, the following paragraphs of this subsection shall have effect for all purposes, whether civil, criminal, or otherwise, but subject to the provisions of any enactment which distinguishes in any way between adopted children and children other than adopted children, namely:

- (a) The adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock: Provided that, where the adopted child is adopted by his mother either alone or jointly with her husband, the making of the adoption order shall not prevent the making of an affiliation order or maintenance order, or of an application for an affiliation order or maintenance order, in respect of the child:
- (b) The adopted child shall be deemed to cease to be the child of his existing parents (whether his natural parents or his adoptive parents under any previous adoption), and the existing parents of the adopted child shall be deemed to cease to be his parents, and any existing adoption order in respect of the child shall be deemed to be discharged under section 20 of this Act: Provided that, where the existing parents are the natural parents, the provisions of this paragraph shall not apply for the purposes of any enactment relating to forbidden marriages or to the crime of incest:



**B      *Appendix Two - Children, Young Persons and Their Families Act 1989***

**5. Principles to be applied in exercise of powers conferred by this**

**Act**---Subject to section 6 of this Act, any Court which, or person who, exercises any power conferred by or under this Act shall be guided by the following principles:

- (a) The principle that, wherever possible, a child's or young person's family, whanau, hapu, iwi, and family group should participate in the making of decisions affecting that child or young person, and accordingly that, wherever possible, regard should be had to the views of that family, whanau, hapu, iwi, and family group:
- (b) The principle that, wherever possible, the relationship between a child or young person and his or her family, whanau, hapu, iwi, and family group should be maintained and strengthened:
- (c) The principle that consideration must always be given to how a decision affecting a child or young person will affect---
  - (i) The welfare of that child or young person; and
  - (ii) The stability of that child's or young person's family, whanau, hapu, iwi, and family group:
- (d) The principle that consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child or young person:
- (e) The principle that endeavours should be made to obtain the support of---
  - (i) The parents or guardians or other persons having the care of a child or young person; and
  - (ii) The child or young person himself or herself--- to the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:
- (f) The principle that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time.

**6. Welfare and interests of child or young person deciding**

**factor**---Where, in the administration or application of this Part or Part II or Part III or Part VI (other than sections 351 to 360) or Part VII or Part VIII of this Act, any conflict of principles or interests arises, the welfare and interests of the child or young person shall be the deciding factor.

**13. Principles**---Subject to sections 5 and 6 of this Act, any Court which, or person who, exercises any powers conferred by or under this Part or Part III or sections 341 to 350 of this Act shall be guided by the following principles:

- (a) The principle that children and young persons must be protected from harm, their rights upheld, and their welfare promoted:
- (b) The principle that the primary role in caring for and protecting a child or young person lies with the child's or young person's family, whanau, hapu, iwi, and family group, and that accordingly---
  - (i) A child's or young person's family, whanau, hapu, iwi, and family group should be supported, assisted, and protected as much as possible; and
  - (ii) Intervention into family life should be the minimum necessary to ensure a child's or young person's safety and protection:
- (c) The principle that it is desirable that a child or young person live in association with his or her family, whanau, hapu, iwi, and family group, and that his or her education, training, or employment be allowed to continue without interruption or disturbance:
- (d) Where a child or young person is considered to be in need of care or protection, the principle that, wherever practicable, the necessary assistance and support should be provided to enable the child or young person to be cared for and protected within his or her own family, whanau, hapu, iwi, and family group:
- (e) The principle that a child or young person should be removed from his or her family, whanau, hapu, iwi, and family group only if there is a serious risk of harm to the child or young person:
- (f) Where a child or young person is removed from his or her family, whanau, hapu, iwi, and family group, the principles that,---



- (i) Wherever practicable, the child or young person should be returned to, and protected from harm within, that family, whanau, hapu, iwi, and family group; and
- (ii) Where the child or young person cannot immediately be returned to, and protected from harm within, his or her family, whanau, hapu, iwi, and family group, until the child or young person can be so returned and protected he or she should, wherever practicable, live in an appropriate family-like setting---
  - (A) That, where appropriate, is in the same locality as that in which the child or young person was living; and
  - (B) In which the child's or young person's links with his or her family, whanau, hapu, iwi, and family group are maintained and strengthened; and
- (iii) Where the child or young person cannot be returned to, and protected from harm within, his or her family, whanau, hapu, iwi, and family group, the child or young person should live in a new family group, or (in the case of a young person) in an appropriate family-like setting, in which he or she can develop a sense of belonging, and in which his or her sense of continuity and his or her personal and cultural identity are maintained;
- (g) Where a child or young person cannot remain with, or be returned to, his or her family, whanau, hapu, iwi, and family group, the principle that, in determining the person in whose care the child or young person should be placed, priority should, where practicable, be given to a person---
  - (i) Who is a member of the child's or young person's hapu or iwi (with preference being given to hapu members), or, if that is not possible, who has the same tribal, racial, ethnic, or cultural background as the child or young person; and
  - (ii) Who lives in the same locality as the child or young person;
- (h) Where a child or young person cannot remain with, or be returned to, his or her family, whanau, hapu, iwi, and family group, the principle that the child or young person should be given an opportunity to develop a significant psychological attachment to the person in whose care the child or young person is placed;
- (i) Where a child is considered to be in need of care or protection on the ground specified in section 14 (1) (e) of this Act, the principle set out in section 208 (g) of this Act.



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